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## RAILWAY LAND-GRANTS.

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ALTHOUGH the last session of Congress was largely occupied with the consideration of land-grants to railways, and bills relating to nearly all such grants ever made were introduced, yet no bill was passed or final action taken. This resulted in a great degree from the intrinsic difficulty and importance of the subject, which became more apparent as examination of it progressed. The number of grants was great; some were to States, and some to companies. In many cases no work whatever had been done; in others the roads were partly made, and in others completed. Sections of roads had been accepted by the President after the time fixed for the completion of the road. New legislation had also been passed after the lapse of the period in which the whole work was to be done, and transfers of the lands had been made by one company to another. The charters and grants were not all alike, but differed in many important particulars. Bonds had been issued, and mortgages covering the land granted had been executed. Much of the land had been sold to actual settlers, and the money received in payment therefor. In some cases the Government had undertaken to do certain things, but had postponed action. Towns had been built, rights had attached, money been invested, business engaged in, all on the faith of the enjoyment of the land-grant. It was apparent that if Congress undertook to deal finally with the subject, and to declare and enforce forfeitures without the aid and intervention of the courts, a separate bill would be necessary in each case, as it was clearly impossible to make one law cover them all; and that an infinite number and variety of questions would arise, intricate and difficult—questions of law and of fact; questions between the United States and some of the States, between the Government and corporations and individuals; questions of title to franchises, and to

real estate, of the validity of the acts of a coördinate branch of the Government and their effects, between the Government and holders of the bonds of companies; questions of forfeiture and of waiver, questions of when a forfeiture should be enforced, and to what extent, whether the Government had not estopped itself, whether the right of forfeiture had not been equitably lost by acquiescence and delay on the part of Congress, whether one company could legally transfer its rights to another, and whether the lands granted vested *in presenti*, or only on the completion of the road.

No legislation ever before Congress presented such a variety of questions, or required more careful examination; nor was any question more unsuitable for Congressional action, or more in need of judicial consideration. The failure of Congress to take any decisive step is easily accounted for. That body saw the difficulties, and its incapacity to deal with them alone. How was a committee of either house to ascertain facts? It had neither time nor facilities for the ascertainment of the truth, for such investigations would practically engross a committee and prevent its members from attending to other duties.

If, therefore, this grave and important subject, which is now filling so much of the public mind that both political parties made it a feature in their platforms, is to be dealt with fairly and fully and justly, Congress should not attempt to do it itself, but should provide for its submission to judicial tribunals. Senator Morgan, of Alabama, by his bill (S. 1445), has sought to do this, and supported the general proposition in a most conclusive speech. He points out plainly the insurmountable objections to any final and obligatory solution of the question except through the decisions of a court. He assumes that in proper cases Congress should take the initiatory steps to bring the case before the courts, which should be invested with the power to decide all controversies growing out of the grant, whether between the Government and a State or between the Government and a company, and also the rights of persons holding lands or other rights under the company. When, therefore, Congress thought that a company had forfeited its land-grant, all that was necessary was to pass a declaratory bill or joint resolution, and then the courts should take jurisdiction and decide: first, whether, under the charter, the lands were forfeitable, or whether, as is claimed in some cases, they were absolutely dedicated to

the construction of the road ; second, if forfeitable, whether a forfeiture had in fact occurred ; third, if in strict law a forfeiture had occurred, whether it had not been waived, or whether the Government was not equitably estopped from asserting it.

In regard to the last point, while it is claimed that the Government cannot be estopped, or be guilty of laches, and while as a general proposition this is true, yet the Government should be slow to deal harshly and strictly with its own citizens, and can voluntarily release these sovereign rights, or at least put itself in a situation in which it would be improper to exercise them. When the United States contracts with its own citizens, it does not and should not stand in the attitude of a sovereign, but as a contracting party, and should construe the contract precisely as if it were between two citizens. To do anything else, is to throw the sword into the scales. The Supreme Court, in the Central and Union Pacific Railroad cases, decided this to be the law. That court says :

“It has been often decided by this court that a charter granted by a State creates a contract between the State and the corporator, which the State cannot violate.” (13 Wallace, 264.) “A grant is a contract executed. Congress cannot, by direct legislation, vacate mortgages already made under powers originally granted. When a law is in its nature a contract, where absolute rights have vested under that contract, a repeal of the law cannot divest those rights. A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.” (6 Cranch, 87.)

But if Congress shall insist on trying these questions, and erect itself into a court, it ought at least to be a court of equity. Nothing else would be just, nothing else would be tolerated by the people. It is true that Congress would be trying a case in which it was one of the parties, would be passing upon the validity, construction, and binding force of its own acts, would be called upon to say whether it had not been guilty of some default, whether it had waived its rights ; all of which ought to constitute an overwhelming objection to any action on the part of Congress beyond taking the necessary measures to have the rights of all parties fairly adjudicated. Congress being one contracting party, there can be no reason why, if it claim rights for the Government, it should not assert them and have them passed upon. But there are conclusive reasons why Congress itself should not decide its own case and pass upon its own claims and acts, and deprive the other contracting party of the rights exist-

ing as to all other persons and in all other cases, of having a fair and full investigation before the tribunals that are created for the purpose and can alone decide properly. And if Congress should sit as a court of equity, as of course it would do, let it be recollected that the sole ground upon which a forfeiture is claimed is, that the State or company did not complete the road within the time prescribed, and that nothing shall be heard by way of excuse, nor can any laches or default be imputed to the United States. If this ground were taken before a court of equity, what treatment would it receive? In the beginning, the court would say to the United States, "You are a plaintiff here; you are a contracting party, and must be treated only as such. You shall not be allowed to eke out your just and equitable rights, or excuse your own shortcomings, by the use and weight of your sovereignty." And having said this much, it would proceed to apply the well-known principles of courts of equity, laid down so clearly in "*Pomeroy on Contracts*":

"In all ordinary cases of contract for the sale of land, if there is nothing special in its object or in its subject-matter, although a certain period of time or particular day is stipulated for the completion of the agreement or execution of any of its terms, equity treats this provision as formal rather than essential, and permits a party who has suffered the period to elapse within which he should have done the acts on his part according to the literal terms of his agreement, to perform such requisite acts after the prescribed date, and to compel a performance by the other party, notwithstanding his own delay." . . . "Finally, the condition of forfeiture may be waived, and is waived, by the conduct of the party entitled to enforce it, which is only consistent with the continued efficacy and subsisting obligation of the contract."

These are the just principles that a court of equity would apply, and Congress, sitting as a court of equity, should be bound by them. It must always be borne in mind that there was a vast difference in the motives and purposes of Congress in granting lands to different railway companies. Where the grant was to a State, it was in the main only one way of giving that particular State some portion of the public lands to be used for her own interior development. To many companies the grant was a mere business transaction between the Government and the company, and had no other or higher end than the opening and settlement of the country and the convenience of business. But in a few cases public considerations of greatest gravity constituted the mainspring of action. The grant

was not made merely to facilitate intercourse, but also for the security and protection of the Government itself. The Union and Central Pacific roads were pushed forward with great vigor, at immense expense and through the greatest natural difficulties, to bind our Pacific coast States to the Union, at a time when the strength of the Constitution and its centripetal powers were strongly tested. So, too, with the Northern Pacific, the history of and legislation in regard to which form perhaps the best illustration of the difficulties attending congressional judicature. That road has been regarded, in all the legislation relating to it, as standing on high, peculiar, and exclusive grounds, from its great public importance.

The State of Maine granted the first charter for the building of a Northern railway to the Pacific coast. Such was then the state of feeling in the country, that its projectors believed the people would come forward and contribute the money necessary to make and equip the road. So strong was this feeling, and so profound was the opinion that the funds would be obtained by a sort of popular uprising, that the charter absolutely prohibited the execution of any mortgage by the company to raise funds. But it was soon ascertained that a State charter was not broad and great enough for a work to traverse other States and Territories and substantially span the continent. So Congress was asked to grant the sanction of the United States to the work. In July, 1864, Congress granted the company a charter, retaining the main features of the original, and giving land, but no money.

The war was then at its height, and the Northern mind was inflamed against England, which it was thought exhibited sympathy for the South. But in less than a year from the date of the charter the South was vanquished, and with the surrender the apprehensions as to what England might do were much moderated. The money that was expected to come in to carry on the work did not make its appearance, and it became apparent that the road would never be made from that source. Nearly six years having passed, and the people having made no voluntary contribution, another application to Congress was necessary, and a resolution was passed "authorizing the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions,—real, per-

sonal, and mixed,—including its franchise as a corporation,” and also to locate and construct the road.

The fact had become transparent that the land-grant was worth nothing without the right to mortgage it, and that a large portion of the necessary money had to be obtained upon the credit of the property of the company, which then consisted almost wholly of the land-grant. Therefore, Congress allowed the lands to be mortgaged in advance, not a portion of them only, but every acre and fraction of acre, all the way from Lake Superior to the Pacific Ocean. No reservation or exception was made, or limitation or restriction imposed; and the action of Congress was not merely a permission to execute the mortgage, but an invitation to the people to lend their money to the company, on the credit of the only thing of value the company then had, the lands granted.

Puget Sound is a splendid body of water on our extreme north-western border. It is the best point on the Pacific coast from which to reach the Asiatic trade, and is easy of access through the British Possessions. A Pacific road to San Francisco, or any point south of Puget Sound, would be safe from foreign competition; but not so with one to Puget Sound, and the apprehension that England would make such a road, which would intercept much of our trade, and be dangerous in case of war, was one of the main reasons for passing this charter and for giving this company rights that existed in no other. The bill being before the House, Mr. Sweat said :

“This matter has been considered by the British Government, and by British capitalists, and they will, it is believed, build a road through the British Possessions to Puget Sound, if this road is abandoned.”

The apprehension of a road on British soil to the same harbor, which would be a great rival, not only for the Asiatic trade, but for that of our country to the south, and would at the same time be the means of transporting men and munitions of war in case of hostilities between Great Britain and the United States, was a specter that loomed up largely in that day. The war was then pending. What Great Britain was going to do was uncertain, and it was considered wise to provide against her on all sides and in every way.

Congress thought that the lands granted were then of no value, and would not be of any for many years, unless made so

by the construction of a railway; that the Government was to get a great through line completed, which should aid in settling the Indian question, bring other lands into market, invite immigration, secure the trade of Asiatic nations, afford a means for the transportation of troops and supplies, and be a line of defense in case of war; and all for no consideration on the part of the Government, or a consideration not then deemed of any value.

Acting under the authority given by Congress, the company did mortgage the entire land-grant and issue its bonds, which have gone into general circulation. This being the situation, is it competent for Congress, or if competent, is it right, to diminish the securities of the bondholders in the slightest degree, or to take away any portion of the land? Precisely the same reasons exist now as during the war, for encouraging and aiding the construction of a railway along the border. What was predicted and apprehended during the debates, as to the purposes of England, has come to pass; and while our northern border route to the Pacific is threatened at home, and in the very body that created it, Great Britain and the Dominion of Canada are pushing their road to Puget Sound and aiding it with subsidies and Government credit. The Canadian Pacific Railway was begun about the same time that the Northern Pacific was; but not much progress was made till 1881, when a company agreed to build a railway from Lake Nipissing, near the north-east shore of Lake Huron, to Port Moody, on Bussard Inlet, in British Columbia, opposite the south end of Vancouver's Island, and to complete it by May 1, 1891, and maintain and operate it forever. When this arrangement was consummated about seven hundred miles of the road had already been made, and the Dominion of Canada gave the company that seven hundred miles of road and 25,000,000 acres of land and \$25,000,000; making in all an out-and-out donation of seventy or eighty millions of dollars. And recently the Government has made further advances by loans to the company, on good terms, and the work is progressing vigorously. But as it is not to be finished for seven years yet, there is still time for us, if not embarrassed by unfriendly legislation, to reach Puget Sound several years in advance, and plant ourselves securely there, opening business communications, and acquiring trade, which can afterward be maintained. The importance of this to the people of the United States is incalculable, and the policy of delaying it cannot be otherwise than short-sighted.



While our Atlantic coast is indented all the way from Canada to Mexico with harbors, there are but three good ones on the entire Pacific coast—San Diego, San Francisco, and Puget Sound, and it is in the waters of the latter that the United States and England are to meet and contend for the trade of Asiatic countries. Never did road connect two such bodies of water as Lake Superior and Puget Sound. Lake Superior is a vast inland harbor, surrounded by a rich country with cities and towns, and in it centers the trade of an immense region and of millions of capital. Puget Sound is another immense harbor. From the Straits of Fuca, which constitute its outlet to the ocean, it has an air-line length of eighty miles, and a coast-line of eight hundred and six miles. Within, all the waters are navigable, and the smaller inlets afford numerous safe, deep, and capacious harbors. Is the construction of a road between two such bodies of water to be impeded by any but the most overpowering motives of public policy? Puget Sound is partly within British territory, and can be as easily reached on that side as on this. The trade of Asia has always enriched the nation that enjoyed it, and, instead of hindering or embarrassing lines of communication and channels of trade with that continent, our Government should encourage and facilitate them in every legitimate way. The Supreme Court well describes the public importance of certain great roads; for in the Union Pacific case it uses this language:

“This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end in view, rather than the particular means of securing it. The project of building the road was not conceived for private ends, and the prevalent opinion was, that it could not be worked out by private capital alone. It was a national work, originating in national necessities and requiring national assistance.”

But in cases where a road has not been completed within the time prescribed in the grant, and it is claimed that a forfeiture of the lands has thereby been incurred, nevertheless the forfeiture may be waived and absolutely nullified. The charters all provide that when a section of twenty-five miles is made, the President shall appoint commissioners to examine and report upon it. If the report is favorable, the President is authorized formally to accept it. When this has been done,—not once only, but many times,—Congress cannot go behind it. If the

President acts as an independent and coördinate branch of the Government, then of course his acts are conclusive, and cannot be reversed or rescinded by another department. And if he be only the agent of Congress, performing a ministerial act for that body, and did repeatedly perform it, with the knowledge of Congress and without objection or protest, then Congress is bound by the acts of its agent. It is clear what the intention of Congress was in granting lands to aid in conducting a road to Puget Sound. That body was not treating with a company for the mere profit of the latter or the promotion of business, but was beginning a great and indispensable public work, and providing for its completion in any event. Therefore the clause, found in other grants, that the lands should revert to the United States if the provisions of the charter were not complied with, was omitted in this, and in its place was substituted one that dedicated the lands irrevocably to the completion of the road.

But if Congress had a clear legal right to declare a forfeiture of a land-grant, or any part thereof, still, in equity, the power should not be exercised, when the sole ground on which the right is asserted is, that the road was not completed in time. The panic of 1873 in a single day withered up stocks, shrunk values, destroyed credit, made rich men bankrupt, stopped many branches of business, closed iron and manufacturing establishments, arrested railway building, and threw the poor out of employment, and its disastrous effects were felt in every part of the United States and among all classes of people. The Government of the United States itself was unable to fulfill its obligations. The Secretary of the Treasury, in 1880, reported that the panic had made it impossible for the Government to meet the requirements of the sinking fund, which had fallen into arrears more than fifty million dollars during the six years ending in 1879. The panic rendered it impossible for the Government to maintain the sanctity of the sinking fund, not for one year only, but for six consecutive years, and the very same during which the railways, from the same causes, were compelled to suspend work. The Government had sovereign power, immense resources, good credit, and almost unlimited power of taxation, and with all could not perform its contracts, but let the sinking fund diminish each year, until, in 1879, the diminution was over thirty-six million dollars. With this fact before it, does Congress seriously propose to hold the company contracting with

it to a strict account? to forfeit their property because they did not do what the Government itself did not and could not do?

Upon the whole, it would seem wise for Congress to confine itself, on this grave question, to such legislation as will authorize the courts to hear and adjudicate all controversies growing out of the land-grants. So far as grants have been made to States, and there is no compliance whatever on the part of the State with the conditions of the grant, there ought to be no difficulty. The whole matter could be settled easily and promptly by a retrocession by the State to the United States, which no doubt all the States would readily do upon a proper case being made. But in no event ought those great lines that have become useful to the Government, and will be essential in times of trouble, to be disturbed. If the companies now controlling them are not doing their duty, let Congress act under the power reserved in the charter, and do any and all things that may be needful to insure a speedy completion of the road.

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